No. 96-455

U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

EDWIN DEJESUS, individually and on behalf of all others similarly situated, CAROLYN PENZO, RICHARD C. LARKIN, WILLIAM M. COOKE, and RANDY J. LANE,

Petitioners,

—v.—

SEARS, ROEBUCK & CO.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the objections of certain Allstate Insurance Company agents to the job requirements that they lease specified computer equipment and advertise in the Yellow Pages through a specified advertising agency give rise to federal antitrust claims.

PARTIES TO THE PROCEEDING

The petitioners, appellants in the Court of Appeals, are Edwin De Jesus, individually and on behalf of a purported class, Carolyn Penzo, Richard C. Larkin, William M. Cooke and Randy J. Lane.

The respondent, appellee in the Court of Appeals, is Sears, Roebuck & Co. Sears, Roebuck and Co. has no parent companies or subsidiaries that have issued shares to the public, except MaxServ, Inc.; Sears Canada Inc.; and Sears, Roebuck de Mexico, S.A. de C.V. Sears is the majority owner of each. The Allstate Corporation, the parent of Allstate Insurance Company, was previously a wholly owned subsidiary of Sears; Sears sold 19.9% of that interest in a public offering completed on June 9, 1993, and spun off the remaining interest to Sears' shareholders on June 30, 1995. Prior to June 1993, Dean Witter, Discover & Co. was a wholly owned subsidiary of Sears; in that year, Sears sold 19.9% of its ownership interest in a public offering and spun off the remaining interest to Sears' shareholders.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION

STATEMENT OF THE CASE

Respondent hereby incorporates the description of the case in the opinion below, at 2a-8a.

REASONS FOR DENYING THE WRIT

A. There is no conflict with any decision of this Court.

The Second Circuit held below that petitioners could not state an antitrust tying claim by alleging that their employer, Allstate, required them to purchase certain job-related items from specified sources. Specifically, the court below explained, "employment, standing alone, cannot constitute a tying product." 13a. Petitioners object vaguely that this holding "ignore[s] th[e] principles of *Jefferson Parish [Hospital District No. 2* v. *Hyde*, 466 U.S. 2 (1984).]" Pet. 5; *see also id.* at 8, 12.

There is no conflict between *Jefferson Parish* (or any other decision of this Court) and the decision below. The two cases simply do not speak to the same issue. Nothing in *Jefferson Parish* addresses whether an employee's objection to a job requirement that he or she purchase certain items from his or her employer gives rise to an antitrust tying claim.

To the extent *Jefferson Parish* is relevant at all, it plainly *supports* the Second Circuit's holding. As this Court made clear there, the rationale of tying doctrine is to prevent a party *with monopoly or economic power in one product* (the tying product) from leveraging that power into the market for a second product (the tied product) by requiring that the purchaser of the first product also purchase the second. 466 U.S. at 12-16. Petitioners' claim, which is premised on their objection to Allstate job requirements (*not* on any alleged abuse by Allstate of monopoly or market power in a product), simply does not fit anywhere remotely within this paradigm. Allstate is not charged with having monopoly or any other level of economic power in any product market, or with seeking to leverage power in one product market into another product market. No "product" sold by Allstate is even involved; petitioners instead seek to have their employment by Allstate treated as if it were a tying product. Petitioners' complaint is about their

jobs — not about any misuse of product market power by Allstate. Recognizing such a claim would entail an unprecedented and unjustified intrusion of federal antitrust law into garden-variety employment relationships.*

B. There is no conflict with any decision of another Circuit.

Petitioners contend that the Second Circuit's decision rejecting their antitrust tying claim "was in conflict with other circuits' holdings on virtually identical issues." Pet. 5. These purported conflicts, however, are imaginary.

1. Petitioners claim a conflict with *Hand* v. *Central Transport Co.*, 779 F.2d 8 (6th Cir. 1985), which they assert "held that employment as owner-operator of a truck was a tying product." Pet. 6. *Hand*, however, addresses a completely different issue, holding only that any definition of the relevant market for market power analysis must take account of possible submarkets, *see* 779 F.2d at 11; the case nowhere discusses whether employment may be a tying product, let alone "holds" that it may. Moreover, leaving aside the absence of any holding or discussion by the Sixth Circuit, it is not even clear from the cryptic opinion in *Hand* whether the plaintiffs in that case even claimed employment as a tying product. *See id.* at 11 (apparently analyzing the "truck credit market," *not* the employment market, as the "tying product

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* As a fundamental, definitional matter, "[a] tying arrangement is 'an agreement by a party to sell one product, but only on the condition that the buyer also purchase a different (or tied) product.' " *Gonzalez* v. *St. Margaret's Home Housing Dev. Fund Corp.*, 880 F.2d 1514, 1516 (2d Cir. 1959), quoting *Northern Pacific Ry. Co.* v. *United States*, 356 U.S. 1, 5 (1958). Petitioners now suggest that their claim should be considered as something other than a tying claim. Pet. 5, 12. However, petitioners specifically argued the claim to both the District Court and the Second Circuit as a tying claim. In any event, regardless of the label applied to petitioners' claim, it remains clear that their employment grievance does not give rise to a federal antitrust claim.

market"). Indeed, *Hand*, which petitioners now purport to find directly on point, is in fact so marginally relevant that petitioners never even *cited* it to the Second Circuit (or the District Court).*

2. Petitioners claim that, *if* they are "[v]iewed as independent contractors vis-a-vis Allstate," the ruling below somehow conflicts with various cases applying antitrust tying scrutiny to franchisor requirements that their franchisees buy certain products directly from the franchisor. Pet. 6-7. Petitioners offer no reason, however, why this Court should be called upon to address either the uniquely fact-bound question of whether they — under the unique circumstances of Allstate's "Neighborhood Office Agent" (NOA) program — are independent contractors, or why the label applied to an

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* The federal courts have, in actuality, repeatedly rejected efforts to treat employment as a tying product, recognizing the basic inconsistency of that proposition with the settled requirement that a tying claim begin with the defendant's sale of a tying product to the plaintiff. *See Waldo* v. *North American Van Lines, Inc.*, 669 F. Supp. 722 (W.D. Pa. 1987) (rejecting such claim as a "tortured comparison" to a true antitrust tying claim: "It is a fundamental principle of antitrust tying law that an alleged tying arrangement requires that at least two products and/or services be purchased by the same individual; that is, there must be lineal movement between the products."); *Everhart* v. *United Refining Co.*, 1980-81 Trade Cas. (CCH) ¶63,788, at 78,208 (N.D. Ohio 1980), and cases there cited; *Goldinger* v. *Boron Oil Co.*, 375 F. Supp. 400, 405 (W.D. Pa. 1974); *aff'd mem.*, 511 F.2d 1393 (3d Cir.), *cert. denied*, 423 U.S. 834 (1975); *49er Chevrolet, Inc.* v. *General Motors Corp.*, 803 F.2d 1463, 1469 (9th Cir. 1986)(no tying arrangement "where [car] dealers perform[ed] repair services for GM and are paid by GM," because "they are not buyers of an allegedly tied product at all, but are sellers"), *cert. denied*, 480 U.S. 947 (1987). The only contrary authority of which respondent is aware, *Bazal* v. *Belford Trucking Co.*, 442 F. Supp. 1089 (S.D. Fla. 1977), is a two-decade old district court decision that has never been followed by any other court. (Moreover, *Bazal* stressed that the plaintiff there had sufficiently alleged economic market power in the truck rental market, *see id.* at 1096-97 — unlike here where petitioners can make no allegation that Allstate possessed market power in any product market.)

employment relationship should matter for antitrust purposes. On any view, petitioners' antitrust claims represent efforts to treat as separate "products" what are inseparable attributes of employment as an Allstate agent, regardless of whether one regards that employment as akin to traditional employment or to the status of an independent contractor.

Petitioners' purported conflict is not a true conflict but only an attempt to argue for a (major) extension of tying doctrine *beyond* the franchisor context. That argument was directly addressed, and disposed of, by the court below. As the court explained in addressing one such case — *Susser* v. *Carvel Corp.*, 332 F.2d 505 (2d Cir. 1964), *cert. denied*, 381 U.S. 125 (1965) — the franchise context fits the traditional model of tying: *i.e.*, it "involve[s] a sale of both the tying product [the franchise] and the tied product to the party complaining of an antitrust violation. This pattern accords with the 'fundamental principle of antitrust law that an illegal tying arrangement requires that at least two products and/or services be purchased by the same individual . . . .' " 13a, quoting *Waldo* v. *North Am. Van Lines, Inc.*, 669 F. Supp. 722, 731 (W.D. Pa. 1987). As the court went on to explain, petitioners' claim does *not* fit this traditional model: "It is simply implausible to regard Plaintiffs' employment . . . for which they are paid by Allstate, as something that Allstate or Sears is selling to Plaintiffs." 13a.

3. Petitioners strain to suggest that there is some tension between the holding below and *Digidyne Corp.* v. *Data General Corp.*, 734 F.2d 1336 (9th Cir. 1984), *cert. denied*, 473 U.S. 908 (1985), which held that a computer database may qualify as a tying product. Once again, the tension is nonexistent. The Second Circuit never held that a database sold on the open market — as in *Digidyne* — cannot be a tying product. Rather, the basis of the holding below was simply that where a proprietary database such as Allstate's — which contains confidential information about Allstate's customers, products, and pricing, and is available only to Allstate's own

agents — is provided (without charge) as an attribute of petitioners' employment, it cannot be deemed a "tying product" for antitrust purposes. 14a.*

4. There is even less to petitioners' call for review by this Court on account of the two unpublished district court opinions which the petition highlights (at 9-11). Leaving aside that a district court decision (let alone an unpublished one) can hardly give rise to a conflict that demands this Court's attention, *Lucas Industries, Inc.* v. *Kendiesel, Inc.*, 1995 WL 350050 (D.N.J. June 9, 1995), did *not* involve an employer's providing of anything to its own employee force. The technical literature that was deemed the tying product in *Lucas* was a product provided to third parties, and the district court stressed that there was "great demand for technical literature separate and apart from demand for parts," that the literature had its own separate market value, and that there was an independent market for the literature. *Id.* at *4. Thus, whether or not *Lucas* was correct in treating the technical literature as a separate product, *Lucas* does not support treating *employee-only* access to Allstate's database as a separate product.

United Farmers Agents Ass'n v. *Farmers Insurance Exchange*, Civ. No. A-92-CA-373 (W.D. Tex. Apr. 8, 1993), adds nothing. The court there did *not* rule that database access provided to employees was a tying product; rather, it merely rejected a challenge to the standing of certain plaintiffs who had never purchased the allegedly tied product. Indeed, as noted by the Second Circuit, the subsequent, *published* decision in the same case (892 F. Supp. 890 (W.D. Tex. 1995), *aff'd*, 89 F.3d 233 (5th Cir. 1996)) specifically rejected the putative tying claim on the ground, *inter alia*, that access to

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* The two district court opinion petitioners cite with *Digidyne — Telerate Systems, Inc.* v. *Caro*, 689 F. Supp 221, 234 (S.D.N.Y. 1988), and *American Computer Trust Leasing* v. *Jack Farrell Implement Co.*, 763 F. Supp. 1473 (D. Minn. 1991), *aff'd*, 967 F.2d 1208 (8th Cir.), *cert. denied*, 506 U.S. 956 (1992) — are irrelevant for the same reason, *and* are both cases in which the tying claims were *rejected*.

the insurance company's database was *not* a tying "product" separate from the plaintiff-agents' jobs. 14a (citing *Farmers Insurance*). And the Fifth Circuit, in affirming, likewise rejected the contention that "electronic access to Farmers policy information" was a cognizable tying product market, terming the claim "essentially an intracompany dispute over how to run a computer system, not a valid claim under the antitrust laws." 89 F.3d at 236-37.

C. This case is in any event an inappropriate vehicle for review.

Even if petitioners had raised an issue worthy of this Court's review, this case would be an inappropriate vehicle for such review, for there are alternative grounds for affirmance of the judgment below that obviate any need to reach the questions pressed by petitioners here.

1. Although respondent Sears is the sole defendant in the case, all of the actions alleged in the complaint were actions of Sears' then-subsidiary Allstate, not of Sears itself. Under established law, a parent corporation is not, without the proffer of a basis for piercing the corporate veil, liable for antitrust violations of its subsidiary. *See Drinkwine* v. *Federated Publications, Inc.*, 780 F.2d 735, 741 (9th Cir. 1985), *cert. denied*, 475 U.S. 1087 (1986). Where a complaint, as here, "cannot fairly be read to allege independent action on the part of the [parent]," or to allege "facts" suggesting that the subsidiary "is a 'mere instrumentality' of the parent," "there is no basis for holding the [parent] liable for the alleged antitrust violations of [its] subsidiary." *Gemco Latinoamerica, Inc.* v. *Seiko Time Corp.*, 685 F. Supp. 400, 403 (S.D.N.Y. 1988) (granting motion to dismiss) (internal quotation omitted).

2. The complaint fails to allege a "necessary feature of an illegal tying arrangement: appreciable economic power in the tying market." *Eastman Kodak Co.* v. *Image Technical Services, Inc.*, 504 U.S. 451, 464 (1992). A complaint "must

allege facts sufficient to support an inference that [the defendant] had 'appreciable economic power' in the tying product." *Trans Sport, Inc.* v. *Starter Sportswear, Inc.*, 964 F.2d 186, 192 (2d Cir. 1992), quoting *Fortner Enterprises, Inc.* v. *United States Steel Corp.*, 394 U.S. 495, 503 (1969). Thus, even if petitioners' employment (or their concomitant access to Allstate's proprietary database) could somehow be viewed as a tying product, petitioners' failure to allege that Sears or Allstate had market power in some cognizable market would doom their claim. Indeed, petitioners have never even offered a proposed market definition. Petitioners' failure to allege any theory of economic power in a tying market reflects the incoherence of their tying claims, which are in reality employment disputes that have nothing to do with any abuse of product market power.

3. Again reflecting the misguided nature of petitioners' effort to transform a dispute over employment conditions regarding advertising into an antitrust claim, petitioners do not allege any harm from the alleged tying. Petitioners do *not* allege that the requirement that Yellow Pages advertising be arranged through Woodward Direct cost any Allstate Neighborhood Office Agent anything more than what such advertising would otherwise have cost. Petitioners' inability even to allege any harm from the supposed tying is, independent of everything else, fatal to their claim. *Esposito* v. *Mister Softee, Inc.*, 1983-1 Trade Cas. (CCH) ¶65,336, at 70,003-08 (S.D.N.Y.) (collecting cases), *aff'd mem.*, 742 F.2d 1445 (2d Cir. 1983), *cert. denied*, 465 U.S. 1026 (1984).*

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* Similarly, the complaint alleged only that "each NOA who *wished to* advertise in the Yellow Pages" was obliged to do so via Woodward Direct (emphasis added), *not* that anyone was *required* to purchase the allegedly tied product. Without such an allegation that a seller has exploited its control over the tying product to "force the buyer into the purchase of a tied product," no tying claim is stated. *Jefferson Parish*, 466 U.S. at 12.

* * *

In sum, the decision below correctly stated the law, and it plainly does not conflict with any decision of this Court or of any Court of Appeals. Even if there were an issue worthy of this Court's attention, moreover, this would hardly be an appropriate case in which to address it.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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